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March 24, 2004

Charles Tiedemann - Zoning Administrator
Carl Weber - Town Administrator
Town of Amherst
Town Hall
PO Box 960
Amherst, NH 03031

BB JD
RH GI
MP Date

Re: Article 18 - Protest Petition

Dear Carl and Charlie:

You have asked me for an opinion regarding the legal effect of a protest petition received with respect to a zoning amendment considered by the Town of Amherst's official ballot annual town meeting on March 9th, 2004. I will set forth my understanding of the facts so that you will be able to correct me if I have misapprehended anything.

Facts

The zoning amendment in question, as I understand it, was identified as Article # 18 on the official ballot while it constituted Zoning Amendment # 4 that was being proposed by the planning board. The text of the ballot question is set forth:

> ***'Are you in favor of the adoption of changes to Article IV, Section 4-3, B.1., Section 4-5, B.1., Section 4-17, B.1., as proposed by the Planning Board, to eliminate wetlands, flood plain, and slopes greater than 20% from the minimum area of proposed lots; and to change Article IX, Section 9-1, Open Space Plan, to eliminate flood plain and slopes over 20% from the density calculations; and to change Article IX, Section 9-1, Planned Residential Development, to eliminate slopes greater than or equal to 20% from the minimum lot area?'***

In order to understand the intended scope of these changes, it is necessary to examine the current version, (prior to the amendment), of the language in the various articles which this amendment seeks to change. The first referenced sections are ***Article IV, Section 4-3, B.1., Section 4-5, B.1., Section 4-17, B.1.*** The first of these, ***Article IV, Section 4-3, B.1.,*** addresses the ***minimum area and frontage requirements*** for lots located in the ***Residential/Rural, (RR), District.*** The second, ***Section 4-5, B.1.,*** addresses the ***minimum area and frontage requirements*** for lots

located in the ***Northern Rural, (NR), District.*** The third, ***Section 4-17, B.1.,*** addresses the ***minimum area and frontage requirements*** for lots located in the ***Northern Transitional Zone, (NTR), District.***

The three sections of the ordinance that are identified above, relate to the minimum area and frontage requirements for three of the residential zoning districts in town. As is typical of zoning ordinances generally, each of these three districts contains a minimum lot size requirement which governs the capacity to use a lot for the construction of a single family dwelling. The minimum lot size identified for each of the three named districts is set forth:

- ***Residential/Rural, (RR), District - two (2) acres***
- ***Northern Rural, (NR), District - five (5) acres***
- ***Northern Transitional Zone, (NTR), District - three & ½ (3½) acres***

As these three ordinance sections were worded prior to the vote, the minimum acreage sections contained no limitations on area other than size. Thus, a lot which was two acres in measurable area was 'buildable' irrespective of any site specific conditions such as topography, ('steep slopes'), or its presence in the flood plain.[1] As worded, and when compared with the zoning sections prior to the vote, the intent of the first part of this amendment appears to be to require that the calculation of minimum lot size, **in any and all of the three residential districts** in the Town, exclude areas with slopes of more than 20% and areas within the flood plain, as defined in the ordinance.

The second part of this proposed amendment impacts the regulations relating to Planned Residential Developments and Open Space Developments. Presently, these two types of developments offer a landowner options to the development of property according to traditional 'grid' subdivision configurations. When using one of these methods, a developer receives certain benefits in the form of relaxation of other requirements in the ordinance. Both of these methods, however, require that the density, (# of permissible housing units), be calculated by considering the gross area less any acreage that is characterized by slopes in excess of 25%. As such, the imposition of the new proposal would only increase this limitation to encompass the additional acreage that is characterized by a slope that is between 25% and 20% and, as such, this proposal would not impact these proposals under these two sections in as great a degree as the conventional single house lot. However, it will impact **all** proposals that are made pursuant to these sections. In addition, acreage within the designated 'flood plain' would not be capable of qualifying as adequate for density calculations in the Open Space Plans.[2]

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1 ***Another section of the ordinance, however, eliminated areas of 'wetland' soils from minimum lot size considerations. (See § 4-11.B.1))***

2 ***Pursuant to § IX-1, (page 127), - 'Flood plain' acreage is already excluded from density calculations in the Planned Residential Development so that there would be no difference in the way in which density calculations are presently done in the Planned Residential Development under the new proposed regulation.***

Thus, the new proposal would impact all three major residential districts in Town, (an area far in excess of 1/3 of the land area in the Town, as well as any area in which a PRD or Open Space Regulation proposal may be made, which is most, if not all, of the Town. Moreover, it would apply these exclusion to all residential uses, (conventional lots as well as Open Space/PRD proposals), which had not, heretofore, been the case.

The foregoing proposed amendment was placed on the warrant following a duly noticed and held public hearing, following which a timely protest petition was filed, a copy of which is attached hereto. NH law, in limited circumstances, permits certain interested designated persons to file a 'protest' to a proposed zoning ordinance or amendment.[3] The statute, which will be addressed in more detail below, requires that such a petition, to be effective, must have the requisite number of signatures from the correct class of petitioners, and, also, that the subject matter of the proposed amendment be susceptible to protest, based on criteria in the statute. If the protest petition had the adequate number of signatures and the subject matter was appropriate for a protest, the statute then requires that any such proposal so protested, must receive approval by 2/3rds of those voting. The petition contained the names and signatures of the owners of some of the lots located in the flood plain:

Lot ##	***Name***
M/L 3-25, 4-29, & 4-30,	***Susan M. Currier, as Pres. of Amherst CC***
M/L 3-28	***Fred Doleac, as Pres. of Ponemah Green***
M/L 3-32, 3-32-3	***Mary E. Waterman, Tr'ee***
M/L 4-65	***Peter deBruyn Kops***

The office of the Selectmen made a preliminary determination that the foregoing named parties did, indeed, own the land in question and the petition was not rejected out of hand. As a consequence of this the Moderator, at the start of voting, announced that the protest petition had been filed, (a procedure required by statute). When the final votes were being tallied, the Moderator, assuming from the acceptance of the petition that the same was a valid protest, announced that the proposal had failed to receive the necessary 2/3rds vote to pass, the actual count being 1427 'yes' votes to 1222 'no' votes. The significance of a 2/3rds supermajority requirement on this proposal, therefore, is demonstrated in the following table:

Nature of the Required Pluarility	*Total Votes Cast*	*Needed to Win*	*Actual 'Yes' Votes*	*Actual 'No' Votes*	*Result*
Conventional Majority Vote	2649	1325	1427	1222	**PASSED**
2/3 Supermajority Vote	2649	1766	1427	1222	**FAILED**

Following the voting, (on March 15, 2004), the chair of the Planning Board directed a letter

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3 *RSA 675:5.*

to the Board of Selectmen commending certain legal resources cited therein as support for the proposition that the proposed amendment had NOT failed, but had, indeed, passed, contending that the protest petition was not sufficient due to the nature of the proposed change and urging the Selectmen to seek legal counsel and so declare. The reason advanced by the Planning Board chair for this assertion was that the ordinance being proposed applied to the *'... **entire Town and so the petition should have no effect.** ...'*. Following that letter an opinion was solicited from the undersigned along with a request to outline the appropriate avenues of appeal if anyone felt aggrieved by any decision of the Selectmen with regard to this request.

Summary of Opinion

The nature of the proposed amendment was such that it could not be validly protested pursuant to ***RSA 675:5***, and, as such, the proposed amendment passed by virtue of having received a simple majority of the votes cast. If the Selectmen should consider this opinion and agree with it, they are properly authorized, (as the entity to whom such a petition must, by statute, be addressed), to render a determination, (by proper vote), that the nature of the amendment renders it unsusceptible to protest and, therefore, that the proposed ordinance passed and will be in force. The Selectmen should advise the protesting parties and advise them that they can appeal this decision in one or all of several ways: Pursuant to ***RSA 677:2 & 4, RSA 676:5,*** or by direct appeal to the Superior Court in the manner outlined in the case of ***Morgenstern vs. Rye*** 147 N.H. 558, 561; 794 A.2d 782, 786 (2002).

Analysis of Opinion

The statute that provides the right to protest a zoning amendment recognizes several groups of property owners that are entitled to the special right to protest a zoning amendment. These groups are identified in the pertinent section of the statute, set forth below:

> ***RSA 675:5. Zoning Ordinance Protest Petition.***
>
> ***'... I. Zoning regulations, restrictions and boundaries may from time to time be amended or repealed.***
>
> ***I-a. A favorable vote of 2/3 of all the members of the legislative body present and voting shall be required to act upon any amendment or repeal in the case of a protest against such zoning change signed by either:***
>
> > ***(a) The owners of 20 percent of the area of the lots included in such proposed change; or***
> >
> > ***(b) The owners of 20 percent of the area within 100 feet immediately adjacent to the area affected by the change or across a street from such area. ...'.***

The legislature, in crafting the foregoing, recognized the disproportionate impact that a zoning change can have on certain property and, thus, provided this added measure of protection for the two groups of property owners identified above. However, the right to protest by virtue of being the owner of one or both of the identified parcels is only one of the prerequisites for filing. The second is set forth in the next following section of the statute:

> *'... I-b. Paragraph I-a shall apply only to amendments which alter the boundary locations separating previously defined zoning districts, or to amendments which alter the regulations or restrictions of an area not larger than 1/3 of the land area within the municipality. ...'.*

The lot size calculation restrictions apply to **all** of the three (3) largest residential districts, (as well as PRD and Open Space proposals), in the Town and, (subject of course to a more accurate survey), those districts, collectively, **clearly** appear to account for an overwhelming percentage of the whole town, (clearly more than 1/3). The lot size limitations, assuming they were passed, are implicated in each and every single family dwelling building site analysis from the effective date of the proposal. Nor is it practical to attempt to determine the amount of area of the Town which is characterized by slopes that are more than 25%. Soil types, degree of slopes and other similar information are placed on maps created from aerial surveys which are traditionally only broad estimates. Reliable site-specific information is generally gathered only at site level. Thus, the available means of determining the amount of steep sloped land in the Town, (from USGS topo maps), provides, at best, an approximation. Moreover, while the steep slopes may predominate in one part of town, they are, indeed, present throughout the town, to some degree and, thus, it would be impossible to realistically or accurately calculate the percentage which is called for in the statute.

Indeed, it would appear that such a calculation is unnecessary since it appears that the proposal is a 'global' one which effects more than 1/3 of the land area in the town, (all residential property in town), and, accordingly, the measure is not susceptible to a protest.

The petitioners are owners of property in the flood plain district. Unlike the steep slope characteristic, the flood plain **is** capable of reasonable determination in that it is identified on maps provided by the federal government that contain sufficiently fine detail to permit them to be used to determine eligibility for flood insurance. However, even though the flood plain is capable of determination, it is also true that it is located, to some degree, throughout the town. Certainly, a greater likelihood that property is in the flood plain exists in the portion of town that is located in the Souhegan River Valley. However, that is not the only area of the flood plain and, in the same manner as the slope question, every lot that is being considered for minimum lot size calculation, still needs to be measured against the flood plan paradigm in order to determine its' suitability as a building site.

More importantly, however, the flood plain provision is an integral part of the ordinance and, as such, cannot be removed therefrom for purposes of this analysis. The recent decision in the case of ***Handley vs. Hooksett, 147 N.H. 184, 785 A.2d 399 (2001),*** is illustrative of this axiom. That case involved a protest petition that had been filed against a proposed zoning amendment which contained several component parts. As here, the protestors appeared to be implicated to a greater degree in one of the component parts of the regulation. The NH Supreme Court, in commenting on why it would be inappropriate to sever the ordinance in order to allow the protest petition to be applied to only part of the ordinance, stated:

> *'... In Albert v. City of Laconia, 134 N.H. 355, 592 A.2d 1147 (1991), we applied the doctrine of the "single subject" rule to a statutory limitation against multiple changes to a town charter in a single amendment. Under this rule, it is not the number of amendments grouped together under one "single subject" that is important; rather, it is the interrelated nature of the amendments and the subject at issue. ... We find the "single subject" rule applicable to RSA 675:3 and hold that*

> ***a proposed amendment that includes changes to multiple sections of an ordinance is proper so long as the sections sought to be changed are reasonably germane to the subject of the amendment. ... Our holding is in accord with other courts, which have applied the "single subject" rule in the context of amending town ordinances. ...[citations omitted]... This rule should be construed liberally, allowing municipalities to include in one ballot question all matters that are naturally and logically connected to the single subject presented by the amendments. ...'.*** [4]

In the ***Handley*** case, the zoning amendment being proposed, altered the lot area and density of medium and high density districts based on the availability of public water and sewage services. In the case at hand, the same type of change is being made based on the presence of two factors, (flood plain and steep slopes), that are notoriously implicated in the ability of a building site to process sewage and supply potable water. In ***Handley***, the Court stated that:

> ***'... Here, the single subject of the ballot question was changing the lot area and density of medium- and high-density districts based upon the public water and sewage services provided to each lot. A review of the town's zoning ordinance supports the conclusion that the proposed changes to articles 5 and 6 of the ordinance were interrelated. Both provisions of the ordinance regulate lot size and density for those lots serviced by municipal water or sewer and, as such, it was appropriate to combine the various changes in one ballot question so as to avoid an anomalous result where one lot size would be treated disproportionately from others. ...'*** [5]

It is my opinion that this reasoning clearly applies to the situation in the case at hand and, as such, the ordinance did not require a 2/3 supermajority since the proposed amendment was NOT susceptible to protest due to the provisions of ***RSA 675:5, I-b.***

The next question you asked relates to the manner of making this determination as well as the appropriate avenue for appeal. This is somewhat difficult since the statute does not address this part of the process and there are several other statutes to which resort must be had, none of which are entirely controlling. However, I offer the following protocol, which, in my opinion, presents a defendable and complete process.

I recommend that this opinion be provided to the Selectmen for their review and consideration. If they concur with it and wish to embrace the position represented, they should so determine after consideration in open session and vote. In my opinion, there is no requirement to allow public input but they could do so if they wished. Once that vote is concluded, (assuming a vote supporting the opinion), they should announce that as a consequence this provision will be treated as having been adopted, as a result of the announced results of the balloting and so inform the zoning and planning office. The particular protesting petitioners should be given notice of this decision and advised of their right to appeal.

The manner in which the right to appeal is to be exercised is somewhat more complicated and depends on how one characterizes the Selectmen's decision, (should they act to find that the proposal

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[4] ***Handley vs. Hooksett, 147 N.H. 184, 190; 785 A.2d 399, 403 (2001),***

[5] ***Handley vs. Hooksett, 147 N.H. 184, 190; 785 A.2d 399, 403 (2001),***

was not susceptible to protest). If this decision is treated as a decision **upholding the action of the legislative body on its zoning**, then the most logical choice is to treat any appeal from this decision as a challenge to the decision of the legislative body adopting the proposal. If that is the case, the appropriate avenue of appeal is ***RSA 677:2 & 4,*** providing for a motion for rehearing, ***(§ 2),*** followed by an appeal to Superior Court, ***(§ 4).*** Pertinent provisions of these statutes are set forth:

> ***RSA 677:2. Motion for Rehearing of Board of Adjustment, Board of Appeals, and Local Legislative Body Decisions.***
>
> ***'... Within 30 days after any order or decision of the ... local legislative body ... in regard to its zoning, the selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefor; ... If the decision complained against is that made by a town meeting, the application for rehearing shall be made to the board of selectmen, and, upon receipt of such application, the board of selectmen shall hold a rehearing within 30 days after receipt of the petition. Following the rehearing, if in the judgment of the selectmen the protest warrants action, the selectmen shall call a special town meeting. ...'.***
>
> ***RSA 677:4. Appeal from Decision on Motion for Rehearing.***
>
> ***'... Any person aggrieved by any order or decision of the ... local legislative body may apply, by petition, to the superior court within 30 days after the date upon which the board voted to deny the motion for rehearing; ... For purposes of this section, 'person aggrieved' includes any party entitled to request a rehearing under RSA 677:2. ...'.***

Thus, a motion for rehearing could require the Selectmen to conduct a 'rehearing' on the merits of the protest and, assuming that the decision was to uphold the prior decision, the aggrieved party could appeal directly to Superior Court. Of course, a reading of the foregoing points out that the process, while appearing to lend itself to this purpose, also could be challenged in that the actual decision that will be appealed is not the decision of the legislative body, (the town meeting), but the decision of the Selectmen. That view of this process would pose that the Selectmen, in deciding the proposed article was NOT susceptible to a protest petition had NOT, in fact, made a decision on the validity of the **election**, but, rather, on the **nature of the proposed ordinance** or, alternatively, on the **applicability of the protest petition statute**. Happily, either of these types of decisions also have avenues of appeals.

If the appeal is intended to question the Selectmen's determination that the **nature of the proposed ordinance** is not such as to allow a protest petition, then, arguably, the aggrieved party may resort to the mechanism afforded by ***RSA 676:5,*** which permits zoning interpretations to be taken to the ZBA, as a threshold appeal, and then, (if not successful), to Superior Court:

> ***RSA 676:5. Appeals to Board of Adjustment.***
>
> ***'... I. Appeals to the board of adjustment concerning any matter within the board's powers as set forth in RSA 674:33 may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer. ...***
> ***II. For the purposes of this section:***

> ***(a) The 'administrative officer' means any official or board who, in that municipality, has responsibility for issuing permits or certificates under the ordinance, or for enforcing the ordinance, and may include a building inspector, board of selectmen, or other official or board with such responsibility.***
> ***(b) A 'decision of the administrative officer' includes any decision involving construction, interpretation or application of the terms of the ordinance. It does not include a discretionary decision to commence formal or informal enforcement proceedings, but does include any construction, interpretation or application of the terms of the ordinance which is implicated in such enforcement proceedings. ...'.***

Once this process is concluded, then the provisions for appealing the ZBA decision, (which are the same statutes as identified above, ***(RSA 677:2 & 4)***, would come into play.

The last possibility is to treat the decision of the Selectmen as an interpretation of a statutory provision and simply appeal directly to Superior Court. This was the situation in the case of ***Morgenstern vs. Rye, 147 N.H. 558, 561; 794 A.2d 782, 786 (2002)***, in which the Court pointed out that:

> ***'... A party may appeal an adverse zoning action by way of a statutory appeal, declaratory judgment, or an equitable proceeding. ... A facial challenge to a zoning ordinance may be initiated by way of a statutory appeal or declaratory judgment. Id. A challenge to a zoning ordinance as applied to a particular property may be initiated by way of a statutory appeal, declaratory judgment or equitable proceeding. Id. A plaintiff who chooses to initiate a declaratory judgment action to challenge the validity of a zoning ordinance may do so after the expiration of the appeal period in RSA 677:4 . ...'.***

I offer the foregoing as a statement of potential avenues of appeal. However, I wish to emphasize that I am not commending one of these over the other two. None of the sections above provide a completely clear approach and I caution that the Town and/or the Selectmen should NOT sanction or encourage any one of these appeal mechanisms to the exclusion of the others, since all three have been variously interpreted in the courts and there is no certainty as to how they will be treated in the future. Thus, having advised the aggrieved parties of the possible multiple appeals routes, they should be left to decide which of these to utilize. The safest approach for an applicant is to address all three to avoid being determined to have missed any one. This view was actually sanctioned in the recent case of ***Route 12 Books & Video v. Town of Troy 149 NH 569; 825 A2d 493; (2003)***, in which the Supreme Court commented on the fact that the recent statutory amendment that allowed appeals to the ZBA from administrative zoning interpretive decisions of all other boards, (including the planning board), has created a situation where an individual considering an appeal must commence multiple appeals when the subject of the appeal could, arguably, be considered as giving rise to mutually exclusive remedies.

Thus, in summary, I recommend that the Selectmen consider the foregoing and resolve that the protest petition was ineffective on the basis that the nature of the subject of the ordinance was not susceptible to a protest. If the Board reaches such a conclusion, the Selectmen should advise the petitioners and provide a copy of this opinion to assist them in considering their remedies.

I hope the foregoing was helpful and trust that you will let me know if you have any questions

or comments.

Very truly yours,

William R. Drescher

WRD:bd

Attachment - Copy of Protest Petition, (with clerk's handwritten notations regarding lot numbers)

cc: ***Robert Schaumann - Town Moderator by fax only to 672-8854***
Sent to addressees by regular mail and fax to 673-7694 (Carl Weber) & 673-4138 (Charles Tiedemann)

gcnoff-62
a:\asoannmtgzngprtst.opn.wpd
March 24, 2004

Protest Petition

To: Town of Amherst
Re: Article 18. (ZA No. 4)

The following undersigned being owners of a portion of the area of the property affected by and included within the proposed:

Article 18. (ZA No. 4)

Are you in favor of the adoption of changes to Article IV, Section 4-3, B.1., Section 4-5, B.1., Section 4-17, B.1., as proposed by the Planning Board, to eliminate wetlands, flood plain, and slopes greater than 20% from the minimum area of proposed lots; and to change Article IX, Section 9-1, Open Space Plan, to eliminate flood plain and slopes over 20% from the density calculations; and to change Article IX, Section 9-1, Planned Residential Development, to eliminate slopes greater than or equal to 20% from the minimum lot area?,

Hereby protest against such zoning change.

✓ 3-25 ✓4-29
4-30

Amherst Country Club, Inc.
72 Ponemah Rd.
Amherst, NH 03031
All parcels that comprise the property belonging to Amherst Country Club; Inc.

By: Susan M Currier, Pres
Susan M. Currier, Pres.

24 %

Ponemah Green Corporation ✓ 3-28
55 Ponemah Rd.
Amherst, NH 03031

The parcels that comprise the property belonging to Ponemah Green Corporation.

By: _____
Fred Doleac, Pres.

Mary Waterman
17 Nichols Rd.
Amherst, NH 03031

MARY E. WATERMAN REV. TR

The parcels owned by Mary Waterman in Amherst, NH. ✓ 3-32

By: Mary Waterman ✓ 3-32-3
Mary Waterman

Peter deBruyn Kops Lot 4-65 ✓ 4-65
377 Boston Post Rd
Peter deBruyn Kops